Supreme Court, U.S.
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No. 051096

In The

Supreme Court of the United States

STUART T. GUTTMAN, M.D.,

Petitioner,

vs.

WILLIAM F. LANG, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the acceptance of *Ex-Parte Communications* repetitively is a Judicial act.

2. Whether a Judge accepting *Ex-Parte Communications* is subject to Prospective Immunity according to *Ex-Parte Young*, 209 U.S. 123 (1908).

3. Whether the Federal Court was correct in denying Prospective Injunctive Relief.

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PETITION FOR A WRIT OF CERTIORARI

Dr. Stuart T. Guttman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the district court is reproduced at (App. 9-10). The court of appeals opinion is reproduced at App. 1-8. The denial of En Banc Rehearing review is reproduced at App. 11.

JURISDICTION

The court of appeals entered its final judgment on January 26, 2006 and this petition is filed within 90 days of that date. This court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to

> the party injured in an action at law, suit in equity, or other proper proceeding for redress."

New Mexico State Statute Rule 21-300(7)(ii) is reproduced at App. 12-15.

STATEMENT OF THE CASE

Petitioner's case revolves around the acceptance of *Ex-Parte Communications* by a State Court Judge. Initially the first presiding Judge in the state court recused herself after receiving ***un-sealed*** Medical Records from Defendant Silverberg. These ***un-sealed*** records were then placed in the hands of the replacement Judge (Judge Lang). Petitioner then requested those records from both Judges and was denied access. Petitioner requested a contempt hearing involving Defendant Silverberg that was to be heard on September 22, 2004 for repetitively missing discovery deadlines. Prior to that hearing Defendant Silverberg sent an ***un-sealed*** E.K.G. to Judge Lang. Petitioner a double Board Certified physician was again denied access to this further ***un-sealed***, record. Thus Petitioner could not use this particular document for questioning during the contempt proceeding, which Defendant won.

As demonstrated the Appellant on pages (1, 13) of his Complaint quotes the use of injunctive relief according to *Ex-Parte Young*, 209 U.S. 123 (1980). The actual quote and statement from the initial complaint is as follows:

> "In the case of Judge Lang, if civil damages were not available certainly the injunctive relief provided by *Ex-Parte Young*, 209 U.S. 123 (1908) would be."

In fact *Ex Parte Young*, 209 U.S. 123 (1908) notes that where an ***act*** to be enforced is alleged to be unconstitutional if and only if that question is first raised in a Federal Court, that court has a right to decide it to the exclusion of all other courts.

The unconstitutional ***act*** Appellant has raised in his Initial Complaint consists of the following:

(a) Accepting ***un-sealed*** medical record from Defendant Silverberg prior to a Contempt of Court Proceeding. These records where not given to the Appellant upon request prior to the proceeding and after Judge Lang accepted them.

(b) Other ***un-sealed*** medical records had been sent to Judge Valerie Huling (the initial judge assigned to the case) that were then given to Judge Lang. Both Judges refused Appellant's request for these other ***un-sealed*** records.

It should be emphasized that these acts were part of the Appellant's Complaint when he filed his action in the United States Federal Court, and thus, was before the Tenth Circuit when they made their decision.

A further statement contained in the Appellant's brief also noted following:

In fact this opinion is reinforced in *Tompkins v. State of Florida*, in the Supreme Court of Florida (Case # SC 01-1619) wherein it is stated that a due process violation arising from *ex-parte* contact was not subject to harmless error analysis. Even in *Rushen v. Spain*, 464 U.S. 114 (1983) the Supreme Court there noted that *ex-parte communications* should be distributed to all parties. The court in *United States v. Microsoft Corp.*, 56 F. 3d 1448 (D.C. Cir. 1995) noted

that the appropriate act for a judge is to refuse all *ex-parte communications*. This opinion is further reinforced by the following citations utilized in the Plaintiff's Opening Brief: *Hathcock v. Navistar, Int'l Transp. Corp.*, 53 F. 3d 36, 41 (4th Cir. 1995) (Judge required to recuse himself on remand due to *ex-parte* submissions); *United States v. Furst*, 886 F. 2d 558, 582 (3rd Cir. 1989) (Judge required to recuse himself from sentencing based on *ex-parte communications* with counsel), cert. denied, 493 U.S. 1062 (1990); *Buckely v. Snapper Power Equip. Co.*, 813 P. 2d 125, 128, 129 (Wash. Ct. App.) (Judge required to recuse himself due to *ex-parte communications* with guardian ad litem and counsel), review denied, 833 P. 2d 287 (Wash. 1991).

The extreme importance of the issue of *ex-parte communication* cannot and should not have been overlooked. The statement in the instant decision about *ex-parte communication* (even if accepted) not rendering the ***act*** non-judicial isn't supported in the legal literature or even the Standard of Judicial Ethics. To show the importance of such an ***act*** in terms of ethics is the fact that both *State and Federal Codes of Judicial Ethics* prohibit *ex-parte communications. See* Model Code of Judicial Conduct Cannon 3(B)(7) (1990); Code of Conduct for Federal Judges Cannon 3(A)(B). 175 F.R.D. 364, 367 (1998). On page seventeen (17) of Appellant's Opening brief is the following exact quote:

> "It is to be noted that even the Local Rules of Judicial Conduct have a bearing on this case. As noted per the present litigation (*See*, page 8 of the Initial Compliant) is enumerated the following. Rule 21-300(7)(ii), that States a Judge shall not initiate, permit or Consider *ex-parte communication.*"

Appellant on page seventeen (17) of his Opening brief even quoted the Local Code of Judicial Conduct Section 21-300(7)(ii) where is the following:

> "The judge makes provisions promptly to notify all other parties of the substance of *ex-parte communication* if it might reasonably be perceived that the party contacting the judge may have gained a tactical advantage."

This is exactly the situation in the State Court where Defendant Silverberg was utilizing an excuse per his Medical Record for having missed discovery deadlines. Thus, prior to Contempt of Court proceeding an ***un-sealed*** record was sent to Judge Lang, but both the Defendant and the Judge Lang refused Appellant's access to the document (especially considering Appellant is a double Board-Certified Physician *in Internal Medicine and Pulmonary Medicine).*

Defendant Silverberg with thirty years legal practice (his statement) had to have known I had a full right to any ***un-sealed*** document sent to a State Court Judge in order to gain an ***unfair advantage***. Obviously the ***un-sealed*** record was utilized in Judge Lang's decision to not grant contempt of court to Defendant Silverberg. Appellant notes this was in his *Initial Complaint.*

In *Pulliam v. Allen*, 454 U.S. 522 (1984):

> "The court held that the doctrine of judicial immunity does not preclude injunctive relief as opposed to money damages against a judicial officer acting in judicial capacity."

It can be stated that both *Forrester v. White*, 44 U.S. 219, 108 S. Ct. 538 (1988) and *Pulliam v. Allen*, have made

it quite clear that absolute judicial immunity is not alive in American Jurisprudence. The citation of *Pulliam v. Allen*, has the following applicable quote to the present case:

> "There is no support for a conclusion that Congress intended to limit the injunctive relief available under 1983 in a way that would prevent federal injunctive relief against a state judge, rather, Congress intended 1983 to be an independent protection for federal rights, and there is nothing to suggest that Congress intended to expand the common-law doctrine of judicial immunity to insulate state judges completely from Federal collateral review. Pp. 536-543."

Reversing the District and the 7th Circuit Court of Appeals, *Forrester*, like *Pulliam*, make it quite clear that absolute judicial immunity is in a sense dead in American Jurisprudence.

REASONS FOR GRANTING THE WRIT

The citation of *Stump v. Sparkman*, 435 U.S. 349 (1978), has suggested that determining whether an act by a judge has immunity is determined by whether the act itself is Judicial and whether the court in such an act has jurisdiction. The United States Supreme Court in *Forrester v. White*, 44 U.S. 219, 108 S. Ct. 538 (1988), following a writ of certiorari, reversed a judgment granting absolute immunity to a judge who fired a probation officer. Justice O'Connor noted in her opinion that the court "has been quite sparing in its recognition of claims to absolute immunity." 44 U.S. at 224. It was held that the actions of

Judge White even negated the application of quasi-judicial immunity. In *Pulliam v. Allen*, 456 U.S. 522 (1984), the court held that judicial immunity does not bar an award of attorney fees against a judge when Plaintiff wins a suit for injunctive or declaratory relief. In *Pulliam*, the U.S. Supreme Court ruled that a magistrate was liable for over $80,000.00 in legal fees even though her actions were indisputable judicial acts within her subject matter jurisdiction. The court in *Pulliam* noted that the doctrine of Judicial immunity does not preclude injunctive relief as opposed to money damages against a judicial officer acting in her judicial capacity. The Tenth Circuit in the present case noted in their decision that Judge Lang was not absolutely immune from a suit for Prospective Injunctive Relief citing *Mireles v. Waco*, 502 U.S. 9, n.1 (1991). But then the court went on to state that any injunctive relief that would address his complaint pertains to past conduct and is not prospective. Petitioner notes that in fact he did request Prospective Injunctive Relief according to the doctrine of *Ex-Parte Young*. This is noted in the appendix section of this brief, where an attached copy of his initial complaint can be found.

Furthermore, the Tenth Circuit has stated that whether or not Judge Lang accepted *Ex-Parte Communications*, was biased against the Petitioner or should have recused himself does not abrogate the immunity or render his acts non-judicial.

However, the decision of the Tenth Circuit in the present case seems to go against the very core of how the U.S. Supreme Court evaluates whether an act is judicial. The U.S. Supreme Court has explained that courts should focus on the "nature" and "function" of an act when deciding whether certain actions were taken in a judge's judicial

capacity. *Mireles*, 502 U.S. at 131, quoting *Stump*, 435 U.S. at 362).

It is in *Stump v. Sparkman*, 435 U.S. 349 (1978) that the factors determining whether an act by a judge is "judicial" one relates to the nature of the act itself, i.e. whether it is a function normally performed by a judge, and to the expectations of the parties, i.e. whether they dealt with the judge in his judicial capacity. Thus the Petitioner feels based on all the above that Prospective Injunctive Relief was proper, and that the act of repetitively accepting *Ex-Parte Communications* does not qualify in any way as a judicial act based on the above definition of such supplied by the *Stump* citation. Therefore, Petitioner seeks this courts intervention since he has been deprived any forum in which to assert his claims.

I. The Court Should Grant, Vacate and Remand In Light Of *Pulliam v. Allen*.

Based on all the reasoning supplied previously, Petitioner feels the denial of Prospective Injunctive Relief was incorrect. The citation of *Pulliam v. Allen*, 466 U.S. 522 (1984) clearly stated that at least Seven Circuits have indicated affirmatively that there is no immunity bar to relief, and in situations where in their judgment an injunction against a judicial officer was necessary to prevent irreparable injury to Petitioner's constitutional rights, courts have granted that relief.

In *Mireles v. Waco*, 502 U.S. 9 (1991), the court noted that whether an act by a judge is "Judicial" one relates to the nature of the act itself, i.e. whether it is a function normally performed by a judge, and to the expectations of the parties, i.e. whether it is be an act with the judge in

his judicial capacity. It is also noted in *Mireles*, that one looks at the particular act's relation to the general function normally performed by a judge. Thus, if Plenary Review is not granted, Petitioner requests that the court grant, vacate, and remand for further consideration in light of their decision. *See Lawrence v. Chater*, 516 U.S. 163, 169-170 (1996) (Per curiam).

II. Is The Acceptance Of *Ex-Parte Communications* a Judicial Act That A Judge Normally Performs.

The U.S. Supreme Court and the various Federal Appellate Courts have not addressed this issue.

In the Seventh Circuit Court noting *Lopez v. Vanderwater*, 620 F. 2d 1229 (7th Cir. 1980), a judge was held partially immune from suit for personally arresting a tenant who was in arrears for rent owed the judge. In 1988, the Eleven Circuit held in *Dykes v. Hoseman*, 776 F. 2d 942 (11th Cir. 1988) that immunity required dismissal of a suit against a Florida judge who had awarded custody of a child to its father, himself the son of a fellow judge. In 1985, the Tenth Circuit Court of Appeals in *Martinez v. Winner*, 771 F. 2d 424, 434 (10th Cir. 1985) held a Federal Judge immune who, during a trial, had conducted secret meeting with prosecutors without notifying the Defendant or his attorneys.

A case that gives excellent guidance as to how a Judicial act should be defined is *Barrett v. Harrington*, 13 F. 3d 246 (6th Cir. 1997); there it is stated that the application of judicial immunity is simple and non-controversial when applied to "paradigmatic Judicial Acts" or acts of actual adjudication, i.e. acts involved in resolving disputes

between the parties who invoked the jurisdiction of the court, *Forrester*, 484 U.S. at 227, 108 S. Ct. at 544. The touch stone for judicial immunity is the function of dispute resolution, or of authoritatively adjudicating private rights, *Barnes v. Winchell*, 105 F. 3d 1111, 1115-1122 (6th Cir. 1997) (citing *Antoine v. Byers & Anderson Inc.*, 508 U.S. 429, 432 (1993)). Consequently anytime an action taken by a judge is not an adjudication between the parties, it is less likely that the act is a judicial one, *Cameron v. Seitz*, 38 F. 3d 264, 271 (6th Cir. 1994) (citing *Morrison v. Lipscomb*, 877 F. 2d 463, 466 (6th Cir. 1989)) in *Barrett v. Harrington*, the court found lack of immunity for a judge who made comments to a reporter.

The United State Supreme Court has utilized the approach of whether the function is one normally performed by a judge. *See Stump v. Sparkman*, 435 U.S. 349 (1978). Beyond the actual rendering of judgments, order, and other acts of actual adjudication, examples of acts which are directly involved in judicial decision making includes ordering police to bring an attorney before the judge, *Mireles v. Waco*, 502 U.S. 9 (1991), approving a Petition related to sterilization of a minor, *Stump v. Sparkman*, 435 U.S. 349, issuing a search warrant, *Burns v. Reed*, 500 U.S. 478 (1991) controlling the courtroom and issuing an arrest warrant. *Sheppard v. Maxwell*, 384 U.S. 333 (1996).

In *Mireles*, 502 U.S. at 13 and in *Forrester*, 484 U.S. at 229, the process of defining a judicial act is one of looking at the "particular act's relationship to a function normally performed by a judge" noting *Barnes*, 105 F. 3d at 1116 (quoting *Mireles*, 502 at 13). In *Forrester v. White*, 484 U.S. 219 (1988), the court also notes that a judicial act is to be one involving the paradigmatic resolution of disputes between parties. In *Forrester*, the court's decision specifically stated

that immunity is justified and defined by the function it protects and serves, not by the person to whom it attaches. Another insightful quote from *Forrester* that is helpful in defining what a judicial act encompasses is "whether the act done by the judge was judicial or not is to be determined by its character, and not by the character of the agent." The court in *Forrester* has further noted that the United States Supreme Court has been quite sparing in its recognition of claims of absolute immunity.

Petitioner strongly feels that all the above citations would reflect that the acceptance of *Ex-Parte Communications* by a sitting state court judge would not qualify as a judicial act. Further, support for the Petitioner's claim that the acceptance of *Ex-Parte Communications* isn't a judicial act, is that the determinative factor for deciding immunity is whether the judge had the jurisdiction necessary to perform an act of that kind in the case. *See Mireles v. Waco*, 502 U.S. 9, 13, 112 S. Ct. 286, 289, 116 L.Ed. 2d 9 (1991).

In terms of accepting *Ex-Parte Communications* by the state court judge, an important and applicable quote from *Rowe v. Fort Lauderdale*, 2002 U.S. APP. 885, *19 n.10, 15 Fla. Weekly Fed. at C241 n.10 (11th Cir. 2002) is the following:

> "Case law is not always necessary to clearly establish a right. A right may be so clear from the text of the Constitution or Federal statute that no prior decision is necessary to give clear notice of it to an official. The official's conduct may be so egregious that an objective and reasonable official must have known it was unconstitutional even without any fact specific case law on point."

A judge is not free, like a loose cannon, to inflict indiscriminate damage whenever he announces that he is acting in his judicial capacity (quoting Justice Stewart, dissenting) in *Stump v. Sparkman*, 435 U.S. 349, 367 (1978). "The proponent of a claim to absolute immunity bears the burden of establishing the justification for such immunity." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432 (1993). The mere fact that a judge commits an act does not make the act judicial in nature, *King v. Thornburg*, 762 F. Supp. 336, 341-342 (S.D. Ga. 1991) (citing *Harris v. Deveaux*, 780 F. 2d 911 (11th Cir. 1986). A judge acts in the clear absence of all jurisdiction if the matter upon which he acts is clearly outside the subject matter jurisdiction of the court over which he presides, *King v. Love*, 766 F. 2d 962 (6th Cir. 1985). A judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction. *Mireles v. Waco*, 502 U.S. 12. "When a judge knows that he lacks jurisdiction, or case law expressly depriving him of jurisdiction, judicial immunity is lost." *King v. Thornburg*, 762 F. Supp. 336, 341 (S.D. Ga. 1991) (citing *Ranking v. Howard*, 633 F. 2d 844, 849 (9th Cir. 1980)). Thus in New Mexico as previously explained in this brief there are a statutes forbidding a judge to accept *Ex-Parte Communications* (noting Rule 21-300(7)(ii) that states a Judge shall not initiate, permit or consider *Ex-Parte Communication* per the *Local Rules of Judicial Conduct*).

III. There Is A Split In The Federal Appellate Courts Involving The Application Of *Stump v. Sparkman*, 435 U.S. 349 (1978).

Some Federal Appeals Courts has required the weighing of four separate factors in relation to the *Stump* test

consisting of the following: (1) whether the act was a normal judicial function; (2) whether the events transpired in the judge's chambers; (3) whether the controversy was then pending before the judge; and (4) whether the confrontation arose directly and immediately out of a visit to the judge in his official capacity, *McAlester v. Brown*, 469 F. 2d 1280 (5th Cir. 1972). *See also Dykes v. Hosemann*, 776 F. 2d 942, 945-946 (11th Cir. 1985); *Harper v. Merckle*, 678 F. 2d 848, 858 (5th Cir. 1981).

Other circuits utilize the two prong test of: (1) does the court have subject matter jurisdiction; and (2) is the act a judicial act.

IV. The Application Of Prospective Injunctive Relief

As previously mentioned elsewhere in this Brief, at least Seven Circuits according to *Pulliam v. Allen*, 466 U.S. 522 (1984) have indicated affirmatively that there is no Immunity bar to Prospective Injunctive Relief. Thus, the decision of the Tenth Circuit in this case that prospective injunctive relief wasn't available, contravenes the U.S. Supreme Court decision in *Pulliam*, and other circuits.

It is also interesting that in going back to the history of Injunctive Relief, *Pulliam* made note of the fact that writs of prohibition in the history of the English Court were available even if the error might be correctable on appeal. The obvious difference in the Petitioners case is that unlike *Pulliam v. Allen*, the lower court denied prospective injunctive relief. In *Pulliam*, injunctive relief had been granted by the lower court, and the Petitioner in that case (the judge) did not challenge the granting of prospective injunctive relief against her.

The first court in *Allen v. Burt*, 690 F. 2d 376, 377 (4th Cir. 1982), found *Pulliam's* actions unconstitutional, and enjoined her from engaging in such conduct in the future.

CONCLUSION

The petition for writ of certiorari should be granted, the judgment below vacated, and the case remanded for further consideration in light of *Pulliam v. Allen*. If the Court does not follow that course, it should grant certiorari and set the case for plenary review.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STUART T. GUTTMAN, Plaintiff-Appellant, v. HERBERT M. SILVERBERG; WILLIAM F. LANG, Defendants-Appellees.	No. 05-2180 (D.C. No. CIV-05-360 JAP/LFG) (D. N.M.)

ORDER AND JUDGMENT*

(Filed December 19, 2005)

Before **BARRETT, PORTFILIO**, and **BRORBY**, Senior Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff Stuart T. Guttman, appearing pro se, appeals from the district court's orders vacating a default judgment and dismissing his case for lack of subject matter

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

jurisdiction, failure to state a claim upon which relief can be granted, and on the ground of absolute judicial immunity. We exercise jurisdiction under 28 U.S.C. § 1291 and AFFIRM.

Guttman, a medical doctor, filed this suit against his former attorney, Herbert M. Silverberg, and the Honorable William F. Lang, a New Mexico District Court Judge in the Second Judicial District (Bernalillo County). Silverberg represented Guttman in proceedings before the New Mexico Board of Medical Examiners, and Judge Lang presided over a civil action in which Guttman brought a claim of malpractice against Silverberg arising out of that representation.

In his federal complaint, Guttman asserts that he brings claims against both defendants under 42 U.S.C. § 1983. He alleges Judge Lang was biased against him when he denied a motion for access to medical records that Silverberg allegedly had provided to the court ex parte in relation to a contempt hearing, and when he denied a motion to recuse himself. He also complains that Silverberg committed fraud and violated the New Mexico Unfair Trade Practices Act by billing him for services not rendered or failing to provide services as advertised.

A copy of the complaint and summons was served on each defendant on April 7, 2005. On April 27, Judge Lang's attorney, Patricia J. Turner, entered an appearance and, on May 3, filed a motion to dismiss on the grounds of absolute judicial immunity and a failure to state a claim on which relief can be granted. On the latter ground, Judge Lang argued that Guttman failed to allege any constitutional injury arising from his alleged conduct or to request any relief related to his alleged conduct.

On May 4, 2005, Guttman filed a "Notice Of Default Judgment Per Rule 55" and an accompanying affidavit in which he sought the entry of default against Silverberg and Turner. Neither document mentioned Judge Lang. On May 5, the clerk of the court entered a default pursuant to Fed. R. Civ. P. 55(a)[1] against Silverberg only. Guttman never moved for entry of default judgment against Silverberg and none was ever entered. On May 9, Silverberg filed two motions, one requesting relief from the entry of default and one requesting dismissal of the case. On June 7, the district court granted Judge Lang's motion to dismiss and both of Silverberg's motions.

On appeal, Guttman argues that the district court should not have set aside the entry of default against Silverberg. He also argues that the district court should have entered default against Judge Lang and, ostensibly in the alternative, that Judge Lang is not entitled to absolute judicial immunity because his acts were nonjudicial.

We review a decision regarding the entry of default for abuse of discretion. *Ashby v. McKenna*, 331 F.3d 1148, 1151052 (10th Cir. 2003). We review de novo the district court's orders granting the defendants' motions to dismiss under Fed. R. Civ. P. 12(b)(1) & (6). *Colo. Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1227 (10th Cir. 2004). Because

[1] Rule 55(a) reads: "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default." Fed. R. Civ. P. 55(a). Guttman's version of this rule, as set forth on page three of his opening brief, erroneously adds the word "judgment" after "default." The entry of default and the entry of a judgment by default are two separate procedures. *Compare* Fed. R. Civ. P. 55(a) *with* 55(b).

Guttman appears pro se, we review his pleadings and other papers liberally and hold them to a less stringent standard than those drafted by attorneys. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 & N.3 (10th Cir. 1991).

An answer generally must be served twenty days after service of the summons and complaint. Fed. R. Civ. P. 12(a)(1)(A). In lieu of an answer, a motion permitted by Rule 12(b) may be served within the twenty-day period. *See* Fed. R. Civ. P. 12(a)(4)(A), (b). In this case, the twenty-day period ended on April 27, 2005. If a party fails to answer or otherwise defend, a default may be entered against the party. Fed. R. Civ. P. 55(a).

A court may set aside an entry of default for good cause shown. Fed. R. Civ. P. 55(c). "[T]he good cause required by Fed. R. Civ. P. 55(c) for setting aside entry of default poses a lesser standard for the defaulting party than the excusable neglect which must be shown for relief from judgment under Fed. R. Civ. P. 60(b)." *Dennis Garberg & Assocs., Inc. v. Pack-Tech Int'l Corp.*, 115 F.3d 767, 775 N.6 (10th Cir. 1997). Because "[a] judgment is void when a court enters it lacking subject matter jurisdiction," *Williams v. Life Sav. & Loan*, 802 F.2d 1200, 1202 (10th Cir. 1986), it follows that lack of subject matter jurisdiction constitutes good cause to set aside an entry of default leading up to the entry of a default judgment, *see id.* at 1203 (holding that, before entering a default judgment, a court has "an affirmative duty to look into its jurisdiction both over the subject matter and the parties"). *See also* Fed. R. Civ. P. 12(h)(3) (providing that a court must dismiss an action whenever it appears that the court lacks subject matter jurisdiction).

To the extent Guttman's claims against Silverberg are based on § 1983, we conclude that the district court lacked subject matter jurisdiction under 28 U.S.C. § 1331. Guttman did not allege state action on the part of Silverberg in his complaint, *see Chapoose v. Hodel*, 831 F.2d 931, 934-35 (10th Cir. 1987) (affirming dismissal of § 1983 claim for lack of subject matter jurisdiction where defendant was not a state actor), and he has not presented any argument in his appellate briefs on his issue. Guttman's suggestion that default was appropriate because Silverberg knew of this defense at the time his answer was due and failed to assert it by that date is without merit. "[L]ack of jurisdiction cannot be waived and jurisdiction cannot be conferred upon a federal court by consent, inaction or stipulation." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974).

To the extent his claims against Silverberg solely involve questions of state law, Guttman did not allege diversity of citizenship under 28 U.S.C. § 1332, and we conclude that diversity is lacking. Although not explicitly stated, it is apparent that the district court declined to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(c)(3) in view of its dismissal of the § 1983 claim against Silverberg as well as the dismissal of the § 1983 claim against Judge Lang, which, we conclude below, was proper. Accordingly, the court did not abuse its discretion in setting aside the entry of default for good cause based on the lack of subject matter jurisdiction and did not err in granting Silverberg's motion to dismiss on the same ground.

Guttman argues that the district court should have entered default against Judge Lang because his attorney, Ms. Turner, entered her appearance on the date an

answer or defensive motion was due, April 27, but did not file a motion to dismiss until May 3. We approach this issue by considering the factors a district court should take into account when determining whether to set aside an entry of default, including "whether the default was willful, whether setting it aside would prejudice the adversary, and whether the meritorious defense is presented." *Dierschke v. O'Cheskey (In re Dierschke)*, 975 F.2d 181, 183 (5th Cir. 1992) (quotation omitted). A court need not consider all of the factors, and may consider other factors as well. *Id.* at 183-84. However, even where there is a meritorious defense and no prejudice to the adversary, "[w]illful failure alone may constitute sufficient cause for the court to deny th[e] motion." *Id.* at 184-85.

The sequence of events shows that Judge Lang's motion to dismiss was filed before Guttman's motion for entry of default and presented a meritorious defense to the claim against Judge Lang. We are not persuaded by Guttman's argument that either Judge Lang or his attorney acted willfully in filing the motion to dismiss after April 27 because we see no substantial advantage to Judge Lang and no prejudice to Guttman in connection with the short delay. Under these circumstances, we perceive no reversible error in the district court's failure to enter default against Judge Lang.

We also conclude that the district court did not err in dismissing the claim against Judge Lang based on absolute judicial immunity. "[G]enerally, a judge is immune from a suit for money damages." *Mireles v. Waco*, 502 U.S. 9, 9 (1991). The immunity extends to acts taken in a judge's judicial capacity; it does not encompass nonjudicial actions or judicial actions taken in the absence of all jurisdiction. *Id.* at 11-12. "[W]hether an act by a judge is a

'judicial' one relate[s] to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Stump v. Sparkman*, 435 U.S. 349, 362 (1978).

Judge Lang's rulings on Guttman's motions were the normal functions of a judge, and the parties were dealing with Judge Lang in his judicial capacity. Whether or not Judge Lang accepted ex parte communications, was biased against Guttman, or should have recused himself does not abrogate the immunity or render his acts nonjudicial. *See Mireles*, 502 U.S. at 11 ("judicial immunity is not overcome by allegations of bad faith or malice"); *Pierson v. Ray*, 386 U.S. 547, 554 (1967) ("immunity applies even when the judge is accused of acting maliciously and corruptly"), *overruled on other grounds by Harlow v. Fitzgerald*, 467 U.S. 800 (1982) (qualified immunity). Furthermore, Guttman has not alleged that Judge Lang improperly took jurisdiction over his case. Therefore, Judge Lang is absolutely immune from Guttman's suit to the extent he seeks damages.

Although "a judge is not absolutely immune from . . . a suit for prospective injunctive relief," *Mireles*, 502 U.S. at 10 n.1., Guttman has not requested any prospective injunctive relief. In his reply brief, he refers to a statement in his complaint that mentions injunctive relief without identifying its nature. It is clear, however, that any injunctive relief that would address his complaints pertains to past conduct (denying his motions) and is not prospective.

Based on our conclusion that Judge Lang is entitled to absolute immunity, we need not reach the district court's alternate ground for dismissal under Rule 12(b)(6). Addi-

tionally, the allegations of errors by the magistrate judge, raised for the first time in Guttman's reply brief, are waived. *See State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 984 n.7 (10th Cir. 1994) (holding that the failure to raise an issue in an opening brief waives that issue). Even if these issues were not waived, we conclude Guttman's arguments are without merit.

The judgment of the district court is **AFFIRMED**. We treat Guttman's "Motion to Reconsider Acceptance of Summons" as a motion to supplement the record on appeal and **DENY** it as moot because the summonses appear in the record. We also **DENY** as moot his "Motion for Allowance of Utilization of Appendix with Reply Brief" because the documents contained in "Plaintiff/Appellant Reply Appendix" are either duplicative of documents contained in the record or irrelevant to our disposition of this appeal.

Entered for the Court

John C. Porfilio
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

STUART GUTTMAN,

Plaintiff,

vs.

No. CIV 05-360 JP/LFG

HERB SILVERBERG and
JUDGE LANG,

Defendants.

ORDER

(Filed June 17, 2005)

On May 3, 2005, Defendant William F. Lang filed a Motion to Dismiss (Doc. No. 10). Defendant William F. Lang makes two arguments:

1. He is entitled to absolute judicial immunity as to the claims Plaintiff asserts against him; and

2. Plaintiff has failed to state a claim upon which relief can be granted against him, requiring dismissal under FED. R. CIV. P. 12(b)(6).

Defendant William F. Lang's motion should be granted on both of these grounds.

In his Complaint (Doc. No. 1), Plaintiff simply alleges that Defendant Judge William F. Lang ruled against him in a state court lawsuit and therefore demonstrated bias. Clearly, the conduct of which Plaintiff complains involved Judge Lang's performance of judicial duties in ruling on motions in a case before him. Plaintiff asserts his claims

against Defendant Judge William F. Lang under 42 U.S.C. § 1983. The Supreme Court of the United States in *Pierson v. Ray*, 386 U.S. 547 (1967) recognized the defense of absolute judicial immunity as to claims for damages against judges made under 42 U.S.C. § 1983. Defendant Judge William F. Lang has absolute judicial immunity in regard to Plaintiff's claims against him.

Plaintiff makes no allegations of constitutional violations or unlawful discrimination by Defendant Judge William F. Lang. In his Complaint, Plaintiff sets forth no facts showing that Defendant Judge William F. Lang violated a federal right of the Plaintiff while acting under color of state law. Under these circumstances, Plaintiff has failed to state a claim upon which relief can be granted. *See Gomez v. Toledo*, 446 U.S. 635 (1980); *Polk County v. Dodson*, 454 U.S. 312 (1981).

IT IS THEREFORE ORDERED THAT Defendant William F. Lang's Motion to Dismiss (Doc. No. 10) is granted and Plaintiff's claims against Defendant William F. Lang are dismissed.

/s/ James A. Parker
SENIOR UNITED STATES
DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STUART T. GUTTMAN, Plaintiff-Appellant, v. HERBERT M. SILVERBERG; WILLIAM F. LANG, Defendants-Appellees.	No. 05-2180

ORDER

(Filed January 26, 2006)

Stuart T. Guttman's petition for rehearing is denied. The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER

by: /s/ Douglas E. Cressler
Deputy Clerk

Code of Judicial Conduct

21-300. A judge shall perform the duties of office impartially and diligently.

A. Judicial duties in general. The judicial duties of a judge take precedent over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

B. Adjudicative responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or acts of criticism.

(3) A judge shall maintain order and decorum in judicial proceedings.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in the judge's official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, marital

status, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, marital status, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. The subparagraph does not preclude legitimate advocacy or consideration by the court when race, sex, religion, national origin, disability, age, marital status, sexual orientation or socioeconomic status, or other similar factors, are issued in or relevant to the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication if it might reasonably be perceived that the party contacting the judge may have gained a tactical advantage.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer with the parties and their lawyers in an effort to mediate or settle matters pending before the judge. Ordinarily the judge will meet jointly with the parties.

(e) A judge may initiate or consider any *ex parte* communications when expressly authorized by law to do so.

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

(9) All cases decided by an opinion of an appellate court shall be by a collegial opinion. Before an opinion is placed in final form, the participating justices or judges shall attempt to reconcile any differences between them. Each justice or judge on each panel is charged with the duty of carefully reading and analyzing the pertinent submitted material on each case in which the justice or judge participates.

(10) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control.

This subparagraph does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This subparagraph does not apply to proceedings in which the judge is a litigant in a personal capacity.

(11) A judge shall not commend or criticize jurors for their verdict other than a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(12) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

C. Administrative responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibility without bias or prejudice, maintain professional competence to judicial administration and should cooperate with other judges and court officials in the administration of court business.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

STUART T. GUTTMAN,	)	
Plaintiff,	)	
v.	)	**No. CIV-05-360**
HERBERT M. SILVERBERG,	)	
and	)	M. Christina Armijo
WILLIAM F. LANG	)	
Defendants,	)	

COMPLAINT

(Filed Mar. 31, 2005)

COMES NOW Plaintiff Pro Se Stuart T. Guttman (hereinafter "Plaintiff"), and for his complaint of damages and 1983 violation against both Defendants Herbert M. Silverberg and William F. Lang of the State Court of New Mexico.

JURISDICTION

This case is, being filed pursuant to 42 U.S.C. 1983 on the grounds that Plaintiff's Civil Rights were violated by reason of an act performed by the Honorable William F. Lang, District Judge, Second Judicial District Court, State of New Mexico, County of Bernaillo, under color of authority derived for equal rights or for refusing to do any act on the ground and it is inconsistent with such law; and 42 U.S.C. § 1983 on the grounds of bias by Judge Lang, as the indication of possible temptation to an average man sitting

as judge to try the case with bias for or against any issue presented to him.

* * *

work not performed. In fact, Defendant demanded that Plaintiff pay his Bar dues.

58. Plaintiff requests damages from Defendant in an amount to be determined at trial for violation of the New Mexico Unfair Trade Practices Act, including treble damages, attorney fees and costs, pursuant to § 57-12-10(B) and (c).

ISSUES OF BIAS INVOLVING VIOLATIONS OF 42 U.S.C. § 1983

1. Per the code of Judicial Conduct Section 21-300 B-4 a judge shall not initiate, permit or consider Ex-parte communications.

2. Per the code of Judicial Conduct Section 21-3007(ii) it states the judge makes provisions promptly to notify all other parties of the substance of the ex-parte communication if it might reasonably be perceived that the party contacting the judge may have gained a tactical advantage.

3. Per the code of Judicial Conduct Section 21-400(c) is known by the judge to have a more than *de minimis* interest that could by substantially affected by the proceeding; or

4. Plaintiff had requested a Contempt of Court hearing against the Defendant, that was heard on September 22, 2004.

5. In order to defend and his of tardiness defendant claimed to have a Cardiac condition with chest pain.

6. On August 19, 2004 the Defendant hand-delivered a letter with an enclosed E.K.G. (Electrocardiogram) copy only to Judge Lang.

7. On August 20, 2004 in Fax memo to Defendant, Plaintiff demanded an E.K.G. copy and was refused by the Defendant.

8. On August 21, 2004 Plaintiff made a Motion for the unsealed E.K.G.

9. Per this August 21, 2004 Motion Plaintiff stated he was not sent an E.K.G. copy yet Defendant was utilizing it in his defense of tardiness and Contempt of Court.

10. Per this August 21, 2004 Motion Plaintiff noted that Defendant had stated that this Cardiac condition seriously impaired [his] ability to work effectively on all pending matters.

11. Per this August 21, 2004 Motion for un-sealed E.K.G. Plaintiff a double Board Certified physician noted whether Defendant was or wasn't incapacitated since chest pain has many varying etiologies including Stress and or Anxiety.

12. Per this August 21, 2004 Motion Plaintiff noted E.K.G. changes can be old or non-significant.

13. Per this August 21, 2004 Motion Plaintiff noted that Defendant while stating he had an Inferior Myocardial Infarction of Inferior Venous Cava, he was never admitted to an Acute Care Facility.

14. Plaintiff states for the record, that as a double Board certified physician in Critical care, an inferior wall Myocardial Infarction involves the Right Coronary Artery not the venous system as the Defendant claimed.

15. Per the Motion for un-sealed E.K.G. Plaintiff noted he's double Board certified with knowledge of E.K.G. interpretation, and wanted to use this knowledge in order to evaluate the veracity of the Defendant's claim.

16. The Plaintiff was dubious about the Defendant having an acute heart attack, since Defendant was sent home per his statement.

17. Per the Motion for un-sealed E.K.G. Plaintiff noted that Defendant did depositions on August 13, 2004 while admitting to an acute Inferior Wall Myocardial Infarction on, August 3, 2004.

18. Yet even with the above, Judge Lang refused Plaintiffs Motion on September 8, 2004.

19. It should be also be noted that Judge Lang ruled for the Defendant on September 22, 2004 per the Contempt of Court hearing while denying Plaintiff use of the E.K.G., in order to question Defendant at that hearing.

20. On September 23, 2004 Plaintiff made an Emergency Motion to excuse Judge Lang.

21. Judge Lang denied the above Motion and refused to remove himself.

22. Per the Motion to excuse Plaintiff stated that Judge Lang had received unsealed E.K.G. from the Defendant and refused to send Plaintiff a copy.

23. Per the Motion to excuse Plaintiff noted that Judge Lang had received unsealed General Medical Records passed on to him by the previous Judge, Vaierie Mackie Huling.

24. The Defendant had volitionally sent unsealed General Medical Records to Judge, Huling who then recused herself because of this act.

25. Judge Huling in open court chided the Defendant who has thirty years experience as an attorney for sending her the records, unsealed, with her resultant recusal.

26. Judge Lang who was aware of the above, yet did the very same thing but refused remove himself from the case.

27. It is obvious that the unsealed General Medical Records will have information in them pertaining to Defendant's Depression, Hypertension, Attention Deficit Disorder and other information. Especially since Defendant has admitted to the above in discovery to the Plaintiff.

28. It should also be noted as stated in Plaintiff's Motion to excuse, that these unsealed Medical Records which were never given to Plaintiff by either Judge Huling or Judge Lang even though he requested them would have a general listing of all Medications and reference to all of the Defendants underlying conditions. This information is potentially helpful in assessing the Defendant missing of deadlines.

29. Per the Plaintiff's Motion to excuse Judge Lang, he stated the following that in fact Judge Lang has done work for the New Mexico Bar in terms of advocacy for Impaired attorneys. Plaintiff further stated that while in

the scheme of things this is admirable it has serious conflict of interest issues in this case, since the Defendants Neuro-Psychological testing, Psychiatric issues, and admitted memory deficit for names was addressed in open court in front of Judge Lang and is available in transcript of proceedings.

30. In fact, Plaintiffs request for independent Neuro-Psychological testing, unsealed General Medical Records, were all refused by Judge Lang.

31. In fact, in an issue of the Bar Bulletin Judge Lang wrote an advocacy article entitled "*Do The Right Thing*" in terms of help to impaired attorneys.

32. In fact, directly beneath that article is an ad Titled "*make the right*" move which notes how one can contact Peer Assistance Panel of the Bar in terms of helping impaired attorneys. This fact was not told to Plaintiff by Judge Lang.

33. As an added factor in this bias issue is the fact that Judge Lang per discussion in open court before him was aware of my litigation against Disciplinary Bar, Supreme Court of New Mexico, and Defendant in terms of the unconstitutionality of the Privacy Rule involving the above and the Judicial Standards Commission.

34. Of even greater importance is the fact that the Defendant, in response to my Motion for un-biased evaluation of Defendant's Psychiatric record stated the following on March 8, 2004 and I quote "*Judge Huling's recusal was done not as confession of bias, but to ensure the parties a trial before a Judge who will not be subject to concerns regarding bias by having been exposed to materials which should be no part of the case.*"

35. In fact, the above applies to the situation with Judge Lang in terms of his having received the unsealed E.K.G. and unsealed General Medical Records.

36. In fact, as stated in Gibson v. Berryhill 411 U.S. 564 (1973) a U.S. Supreme Court case involving Judicial bias and where the same issue of 42 U.S.C. 1983 is noted, I quote the following *"its not a question of actual bias but whether in the course of events there is an indication of a possible temptation to an average sitting* as a judge to try the case with bias for or against any issue presented to him.

37. As excellently stated in Re Murchison 349 U.S. 133 (1955) and I quote *"every procedure which would offer possible temptation to average man as a Judge not to hold balance nice, clear, and true between the state and accused denies the later due process of law. Such a stringent rule may sometimes Bar trial by judges who have no actual bias and and would do their very best to weigh the scales of Justice equally between contending parties."*

38. Herbert M. Silverberg has stated per his December 22, 2004 fax that Judge Lang places Plaintiff pro se under oath due to his prevarications. Another statement in reference to Judicial bias.

CONCLUSION: ISSUES OF BIAS INVOLVING 42 U.S.C. § 1983

To sum up how the U.S. Supreme Court looks at bias. I now utilize the quote from Crawford, vs. Britton no 98-827 (1998). That States *"We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damage in so far as their*

conduct does not violate clearly established statutory or constitutional right of which a reasonable person would have known."

This in the case of Judge Lang, if civil damages were not available certainly the injunctive relief provided by Ex-Parte Young 209 U.S. 123 (1908) would be, where in its stated *"The answer to all this is the same as made in every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without authority of and one which does not affect, the state in its sovereign or governmental capacity. If the act is a violation of Federal Constitution then the officer doing such is stripped of his individual or representative character and is subjected to the consequences of his individual conduct.*

In fact, Section 21-400 of Code of Judicial Conduct A. *notes that a Judge is disqualified and shall recuse himself where his impartiality might reasonably be questioned.*

Plaintiff notes for the record Howlett v. Rose, 496 U.S. 356 (1990) and I quote. 42 U.S.C. 1983 creates a remedy for violations of Federal Right committed by persons acting under color of state law. State Courts as well as Federal Courts have jurisdiction over 1983 cases.

* * *